IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 137 of 1995

Reserved on: 28.9.2007

Date of decision: 26.10.2007

Kamla & Ors. … Appellants

Versus

Baldev Singh & Ors. … Respondents

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the appellants: Mr. D. Dadhwal, Advocate.

For the respondents: Mr. B.K. Sood vice Mr. K.D. Sood, Advocate.

V.K. Ahuja, J. :

This is a Regular Second Appeal filed by the appellant against the judgment and decree of the Court of learned Additional District Judge(2), Kangra at Dharamshala, dated 18.3.1994, vide which the appeal filed by the respondents as against the appellant as against the judgment and decree of the Court of learned Sub Judge Ist Class, Dehra, dated 31.3.1992, dismissing the suit of the plaintiffs for possession and on appeal, decree for possession was passed by the learned first appellate Court.

Briefly stated the facts of the case are that respondents No. 1 & 2 as plaintiffs filed a suit for possession as against the original appellant, hereinafter referred to as the defendants. The allegations made by the plaintiffs were that suit land comprised in Khasra No. 309

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

measuring 0-05-68 Hectares (old Khasra No.240 min) was owned and possessed by the plaintiffs before settlement. During settlement, the defendant in collusion with the settlement staff got himself recorded in possession of the suit land. The defendant forcibly dispossessed the plaintiffs from the suit land at the time of sowing of Rabi crop in 1988. The plaintiffs asked him to deliver the possession of the suit land but he refused, hence the suit filed by the plaintiffs.

Defendants took up various preliminary objections. On merits, it was pleaded that he has been in possession of the suit land as owner since the time of his father. In the alternative, he took up the plea that in case he is not held to be in possession of the suit land, then he has become owner thereof by way of adverse possession since his possession is open, peaceful, hostile and to the knowledge of owners continuously for more than 30 years.

The learned trial Court framed main issue on merit in regard to question as to whether the defendant is owner in possession of the suit land, by way of adverse possession. On conclusion of the trial, the suit for possession filed by the plaintiffs was dismissed. On appeal, those findings were reversed by the learned first appellate Court.

I have heard the learned counsel for the parties and have also gone through the record of the case.

The appeal was admitted by this Court on three substantial questions of law.

During the course of arguments, the learned counsel for the defendant/appellants submitted that there is no proof of possession having been delivered in pursuance of the decree of pre-emption suit and only the mutation was entered on the basis of the decree passed in pre-

emption suit but since the possession was never taken from the defendant or his father by the plaintiffs, the defendant continued in possession of the suit land. It was submitted that the possession of the defendant was found during settlement on actual measurement and, therefore, the defendant was proved to be in possession of the suit land in his own right and as such, the findings of the learned first appellate Court decreeing the suit for possession in favour of the plaintiffs are not based upon correct appreciation of facts and law.

On the other hand, the learned counsel for the respondents/plaintiffs submitted that the defendant had never pleaded as to when he came in adverse possession, from which date and from which date his possession became adverse as against the true owners and since they have proved that the possession was taken by the defendant after they got possession in the pre-emption suit, the suit of the plaintiffs was rightly decreed by the learned first appellate Court.

I may mention here that the perusal of the record of the case shows that initially the suit land was owned by one Shri Narayan who sold it to the father of the defendant Roshan Lal, namely Nath. A suit for possession of the land by way of pre-emption was filed by Roshan Lal, plaintiff, which was decreed but according to the defendant's assertions, the suit land remained with Nath and after his death with defendant who is accordingly the owner of the suit land. A perusal of the written statement filed by the defendant shows that he has taken the plea that his father was earlier in possession of the suit land and after his death he is in possession as owner and in the alternative, he took up the plea that he has become owner by way of adverse possession. No assertions were made by the defendant in the written statement in regard to the

question as to whether even after passing of the decree for pre-emption suit in favour of the plaintiffs, the suit land continued to be in possession of the defendant or his father. In view of the fact that there were no such pleadings of the defendant that the possession was never taken from him by the plaintiffs in pursuance of the decree in pre-emption suit, no findings were required to be given by the learned trial Court as to whether the said decree was implemented or not or the possession continued with Nath even after the passing of the decree. However, the learned trial Court under Issue No. 3 has given this specific finding that the entries in the remarks column of Ext. D-1 were attested on the basis of the decree passed in the pre-emption suit, but the actual possession remained with Nath and after his death, the suit land continued in possession of the defendant as was found by the settlement staff during settlement. This point was never in dispute in between the parties as to whether the said decree was executed or not. Therefore, no findings were required to be given in this regard. Moreover, in case defendant or his father were in possession of the suit land as owner and the possession was never taken by the plaintiffs in pursuance of the decree, they can be said to be in possession as owner, but they cannot be treated to be in adverse possession of the suit land in any manner. The learned trial Court has not given its findings that the defendant or his father continued to be owner of the suit land even after passing of the decree since the decree was never executed, but has given the findings in the alternative that the defendant has become owner by way of adverse possession. This plea was taken by the defendant in the alternative but he never pleaded as to from which date his permissive possession as owner became adverse to the true owners i.e. plaintiffs

and what overt act was done by him to show his hostile title to the suit land. There were no allegations as to when the possession became adverse, in which year or month or in what manner and the simple general allegation made by the defendant in the alternative were accepted by the trial Court without looking into the question that the original possession of the defendant over the suit land or that of his father was permissive being an owner and it never became adverse as against the true owner and if it became adverse in what manner and from which date, month or year. The permissive possession as owner does not itself become adverse as against the true owner until and unless some overt act is done by the defendant to show his hostile title towards the true owner which pleadings were very much lacking in the written statement and as such, the defendant was never proved to be in adverse possession of the suit land as owner. Those findings were rightly reversed by the learned first Appellate Court and the learned first Appellate Court had rightly observed that there was complete lack of animus on the part of the defendant to hold the suit land adversely to the plaintiffs. It was also observed that it has also not been shown as to what time possession of the defendant became hostile to that of the plaintiffs which had ripened into ownership. To my mind, there was nothing for the trial Court to conclude that the defendant has become owner by way of adverse possession in the absence of specific pleadings or proof and, therefore, the learned first appellate Court had come to a right conclusion in reversing the findings under Issue No.1 in regard to the plea of adverse possession. Once the defendant had failed to prove adverse possession over the suit land, the only conclusion that can be drawn is the plaintiffs

were entitled to the relief of possession and it was rightly given by the first appellate Court.

Coming to the substantial question of law framed by the appellant on which the appeal was admitted, there is nothing on record to show that which oral or documentary evidence was not rightly appreciated by the learned first appellate Court or was wrongly ignored by the learned first appellate Court. On the other hand, the appeal was not admitted on 4th substantial question of law in this regard whether the evidence has been properly appreciated and the findings are supported by evidence. The substantial questions of law were only in regard to presumption qua possession whether it could be drawn or as to whether an entry in the Missal Haquiat qua possession a presumption can be drawn about its truthfulness or not. Both the Courts below have relied upon oral as well as documentary evidence and the learned trial Court had rightly discussed the oral as well as documentary evidence in its right perspective and no case is made out for re-appraisal of the whole evidence in this regard, but the conclusion that can be drawn is that the findings recorded by the first appellate Court based upon the evidence are correct keeping in view the pleadings of the defendant. Those findings recorded by the learned first appellate Court do not call for an interference by this Court as there is no merit in the appeal and same is liable to be dismissed, which is dismissed accordingly. However, the parties are left to bear their own costs. Decree sheet be prepared accordingly. Record be sent to the concerned Court(s).

(V.K. Ahuja),
Judge

October 26, 2007
(BSS)